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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MAURICE A. ENDERLE,

Plaintiff and Appellant,

v.

SHARON R. MITCHELL, as Executor, etc.,

Defendant and Appellant.

G032200
(consol. with G033266)

(Super. Ct. No. 343391)

O P I N I O N

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, Andrew P. Banks, Judge. Affirmed.

Law Offices of John W. Powell and John W. Powell for Plaintiff and Appellant.

Corbett & Steelman, Ken E. Steelman and Lance G. Greene for Defendant and Appellant.

* * *

This case, one of many related and consolidated actions, involving several parties, was originally filed almost 25 years ago. Trials on issues in the different cases were bifurcated and heard by a variety of judges who made various rulings and decisions over the life of the actions. Certain of the rulings were appealed to this court.

In this appeal, Sharon R. Mitchell, as executor of the estate of Clyde E. Mitchell (both will be referred to as Mitchell unless the context requires us to refer to either one specifically), appeals from a judgment in favor of Maurice A. Enderle (Enderle) on a promissory note for not quite $62,000 principal and almost $210,000 interest. Mitchell claims the judgment is barred by the one final judgment rule, by Code of Civil Procedure section 583.310, which requires a case to be brought to trial within five years of its filing, and by judicial estoppel. She also claims the amount of the principal should be reduced based on a settlement with a third party, and the amount of the interest should be reduced from the note rate to the legal rate. Additionally, she asserts the court erred in denying her motion for new trial. Finding none of these claims meritorious, we affirm.

Enderle appealed from a denial of his request for attorney fees. He claims that although the note itself does not contain an attorney fee provision, the partnership agreement does and entitles him, as the prevailing party, to an award of fees. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

In 1975, Enderle, Mitchell, and Jim E. Shimozono formed EMS Development Company (EMS), a partnership. (Subsequently, Mitchell's partnership interest was transferred to Clyde E. Mitchell, Inc. We will refer to the individual and the corporation as Mitchell.) Enderle was the managing partner of EMS. In connection with partnership operations, in 1980 Mitchell and Shimozono executed a written promissory

note payable to EMS with a principal amount of just under $62,000 bearing interest at 15 percent per annum. The note was due in October 1980, but was not paid.

Disputes arose among the partners and EMS, leading, among other things, to the ouster of Enderle as managing partner by Mitchell and Shimozono. Several actions were filed by the parties, including EMS's complaint for money, filed in January 1981, to recover on the note. Although the actions were consolidated, various issues were bifurcated and tried or resolved separately.

In 1984, the parties stipulated to bifurcate the issue of "whether Mr. Enderle was properly expelled by the remaining partners of EMS" and try it without a jury. (Capitalization omitted.) In that stipulation, they also agreed that "any findings of fact and conclusions of law reached on the limited issue of the first trial shall be binding on all further proceedings."

Trial on this issue was conducted by Judge Everett W. Dickey in 1984 and 1985. Although the tentative decision was served in 1985, the final statement of decision was not rendered until July 1987, after Judge Dickey completed his tenure as Presiding Judge and Acting Presiding Judge. The court found Mitchell and Shimozono had breached their fiduciary duties to EMS and wrongfully ousted Enderle from the partnership. It "conclu[ded] that the purpose and motivation for the vote to expel Enderle from EMS was to hinder complete exposure of, and to allay possible consequences of, past and ongoing breaches of duty to the expelled partner by Shimozono and Mitchell, all for their personal and pecuniary advantage and to the detriment of the Partnership." (Capitalization omitted.)

Although the issue actually tried was narrow, "the court received extensive evidence concerning" other causes of action in the consolidated action that had not yet been tried because "it was relevant . . . on the issue of the purpose and motivation for the expulsion vote . . . ." Some of this evidence concerned the note, which the court found was "valid, due, owing and unpaid . . . ." In April 1984, prior to the trial on the first

bifurcated issue of the wrongful ouster, the parties had stipulated that Shimozono and Mitchell "duly executed and delivered a valid promissory note to EMS Development Company, without fraud or duress, in exchange for consideration which has been fully received by them and not since failed, which, by its terms, obligates [them] to pay to EMS Development Company or order . . . the sum of $61,998.93, plus interest at fifteen percent (15%) per annum, on or before October 21, 1980."

In 1988, in a minute order documenting a status conference, the court noted it had conducted "an in-depth, line-item analysis of Judge Dickey's Statement of Decision" and "advised counsel that any challenges to those findings (including requests for clarification) must be made to Judge Dickey or to the Court of Appeal. Otherwise, the court feels that it is bound by Judge Dickey's findings . . . . [¶] The court has indicated to counsel that it does not believe that it is entitled to review the evidence given in the first phase of the trial before Judge Dickey . . . . If counsel feel that the court's position is an incorrect one, a noticed motion should be made . . . ." The record contains no evidence of a challenge in front of Judge Dickey or the Court of Appeal.

In 1990, EMS and Enderle settled their disputes with Shimozono. As part of the agreement, Shimozono transferred his interest in EMS to Enderle. In that same year, as a result of trial of the issue before Judge Tully Seymour, the partnership was dissolved.

In 1994, Mitchell and Enderle stipulated in writing to try the remaining issues by declarations and written evidence before retired Judge Jerrold S. Oliver, sitting by assignment. At the hearing where Judge Oliver recited his decision, the parties again stipulated "that when this proceeding is terminated, these parties, whether corporate[,] partnership or individual, owe nobody anything and there will be no further actions against them, by either one . . . ."

The note was one of the issues that came up during the hearing. Enderle remarked that Judge Dickey had found that the note was valid and unpaid. When the

court asked whether Judge Dickey had given Enderle judgment on the note, Mitchell replied, "I don't believe so." Enderle expanded saying, "I don't know. I can't really say that he did. He did make that finding." After reviewing Judge Dickey's statement of decision, the court stated, "I need make no additional finding, it's due and owing."

Enderle then commented that although the note had been found due and owing, there had not been a judgment. "I think that this is one of many other things in the matter that has been reserved to this time to make appropriate - -" The court stopped him, stating, "No. No. I think what you do is, if it isn't too late, and I can't understand why ten years later, why it hasn't been reduced to judgment." Enderle responded, "Well, I think it's because everybody in here has been reserving issues to the final judgment day, which is today." The court continued, "I would suggest that you set a hearing before Judge Dickey and have him sign his judgment. He took evidence on a given Note. That given Note apparently is validly found to be due and owing. I'm not positive it's the same Note that is here . . . [¶] . . . [¶] I would be very happy to make a decision on it, but I'm afraid that the decision I might make might be contrary to Judge Dickey's findings . . . [¶] . . . because I don't know whether it's the same Note." Mitchell concurred, stating that if the court decided the issue, there could be an inconsistent ruling.

The court also expressed concerns that Shimozono was not a party to the hearing, and it had a question about whether a ruling would create joint and several liability or just joint liability. After further colloquy, the court suggested the issue be withdrawn from the hearing, which Enderle did. The judgment resulting from the trial recited, "As to [Enderle]'s contention that this court should give a Judgment on that certain Promissory Note payable to the defendant and signed by [Mitchell] and Mr. Shimozono, the court, believing that this matter had previously been decided by Judge Dickey, has allowed [Enderle] to withdraw this contention as an issue herein."

One month later, Judge Oliver signed another judgment setting out the value of Mitchell's interest in the partnership. Subsequently, in March 1995, Judge

Oliver entered an order awarding attorney fees and costs to Enderle as the prevailing party. He then held a hearing to determine the partnership's net value and ordered Enderle to pay Mitchell approximately $1.19 million for his interest. Mitchell appealed these decisions. We consolidated the three appeals and affirmed the judgment in June 1998. (*Mitchell v. Enderle* (June 30, 1998, G016723 consol. with G017624, G018711) [nonpub opn.].) While the appeal was pending, Enderle filed a certificate of cancellation of the limited partnership. He also filed a motion for summary judgment on the note, which was denied.

Sometime during this period, Clyde Mitchell died. After a personal representative was appointed, Enderle filed a creditor's claim in the estate, which was rejected. Enderle then filed a motion to supplement the original complaint and to substitute the personal representative in as defendant, which the court granted. The supplemental complaint also substituted in Enderele, doing business as EMS, as the plaintiff and alleged that he was the sole owner of EMS, the limited partnership having been awarded to him in the judgment rendered by Judge Oliver. It further alleged that of the consolidated cases, the claim on the note was "the only action not to have yet proceeded to trial." The complaint also pleaded that earlier proceedings had determined that the note was due and unpaid as of July 1987, no payment had been made, and Mitchell was not entitled to any setoffs.

The amended complaint was filed in November 2001; the answer was not filed until April 2002. In May, Mitchell propounded discovery, which Enderle refused to answer on the ground the discovery cutoff date had elapsed. When Enderle filed a motion for a protective order, Mitchell filed motions to compel responses.

In June, Enderle filed a motion for entry of judgment on the note. He asserted that although the note was "tried and decided" by Judge Dickey, judgment had never been entered. The motion was filed "to correct that procedural oversight." Enderle argued he was entitled to judgment based on the stipulation by Shimozono and Mitchell

that the note was properly executed, delivered for consideration and still owing and the findings by Judge Dickey in his statement of decision.

In opposition, Mitchell asserted that the motion was Enderle's improper attempt to avoid discovery, a motion for summary judgment, or a trial. He also contended that Judge Dickey had never tried the note cause of action, Enderle had withdrawn consideration of the claim before Judge Oliver, the judgment affirmed by the court of appeal was a final judgment barring any further action, the claim was barred by judicial estoppel, and Enderle should have gone back to Judge Dickey and had him rule on the note claim, as suggested by Judge Oliver.

The court heard the motion for entry of judgment and the discovery motions together. After the hearing, it made several "findings of fact which are binding in this case." It ruled Judge Dickey's finding as to the note was a finding of fact in the current case, binding the parties, and as of that date it was valid, due, and unpaid. It further found that note was the subject of the complaint at hand and the subject of the stipulation signed by Shimozono and Mitchell.

The court additionally found that the note had been included in the valuation of the partnership. Further, the court found Enderle had been ordered to pay Mitchell for his interest in the partnership, Enderle had the right to continue operating the partnership business on his own, was entitled to the assets of the partnership, including the note, which survived dissolution of the partnership, and had the right to enforce the note.

As to discovery, the court ordered it reopened for the limited purpose of inquiring as to whether there had been any payments since Judge Dickey's statement of decision or whether Mitchell was entitled to any credits or offsets resulting from Shimozono's settlement with Enderle. After additional discovery ensued and the parties filed supplemental papers, the court awarded judgment on the note for the full principal

amount and interest at the note rate through the date the hearing was completed. Mitchell filed a motion for new trial, which was denied.

Enderle filed a motion for attorney fees in the sum of $122,800. Although the note itself had no attorney fees provision, Enderle relied on the partnership agreement which provided for recovery of reasonable fees by the prevailing party if he was "required to institute legal action to enforce his rights under the Agreement . . . ." He pointed to our prior decision where we awarded him fees as the prevailing party, and claimed "the partnership agreement . . . was at the heart of the underlying dispute. The court denied the motion.

DISCUSSION

The Prior Judgment Affirmed on Appeal Does Not Bar This Judgment

Mitchell asserts that the judgment rendered by Judge Oliver and affirmed on appeal was a final judgment that barred any further action on the consolidated cases. Specifically, he relies on the statement in our prior decision that the judgment entered after determination of the value of the partnership was the final judgment. (*Mitchell v. Enderle, supra*, G016723, p. 4.) But, it is clear from the record that the note cause of action remained.

Generally, there is only one final judgment in an action. (*Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 118.) The effect of this rule is that an appeal may be taken only from the final judgment "that terminates the trial court proceedings by completely disposing of the matter in controversy." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 2:21, p. 2-16, italics omitted; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.)

There is an exception to the general rule, however. It provides that in actions involving multiple parties, where the judgment is final and leaves no further

issues as to one of the parties, an appeal may proceed as to the judgment involving that party, while the remainder of the action is pending in the trial court. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437.) In *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, the court ruled that denial of a motion for leave to file an amended complaint was appealable because it operated as a final determination of plaintiff's rights as the administratrix of an estate, even though plaintiff's complaint as an individual remained pending. (*Id.* at pp. 241-242.)

Likewise, in *Justus v. Atchison* (1977) 19 Cal.3d 564, disapproved on another ground in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171, the court held that a judgment disposing of causes of action involving only certain parties was appealable, although causes of action involving other parties remained. It stated "that it better serves the interests of justice to afford prompt appellate review to a party whose rights or liabilities have been definitively adjudicated than to require him to await the final outcome of trial proceedings which are of no further concern to him." (*Justus v. Atchison, supra,* 19 Cal.3d at p. 568.)

Such is the case here. The judgments and order signed by Judge Oliver that were appealed and determined in *Mitchell v. Enderle, supra*, Case No. G016723, involved Mitchell and Enderle, not EMS. The issues between Enderle and Mitchell were all disposed of in that appeal. However, the Oliver judgment did not dispose of EMS's cause of action on the note. Rather, at the time of that judgment, EMS still owned the note, and its claim for payment remained pending in the trial court.

Following the Oliver judgment that dissolved the partnership, Enderle, as the only remaining partner, filed a certificate of cancellation of the partnership. Thus, by virtue of the dissolution and the cancellation, Enderle acquired the assets and rights in EMS and stepped into its shoes by operation of law. As successor in interest, Enderle had the right to substitute in as the plaintiff in the action on the note. But this does not

change the fact that the claim belonged to EMS and its rights were not resolved by the judgment rendered by Judge Oliver.

Mitchell complains Enderle did not follow the court's suggestion that he ask Judge Dickey to have judgment entered and criticizes him for withdrawing the issue from Judge Oliver. While it may have been better to seek a judgment from Judge Dickey, we find no authority, and Mitchell cites none, that required Enderle to do so. Moreover, it is clear from a review of the transcript of the hearing conducted by Judge Oliver that he was not going to rule on the note claim and virtually required Enderle to withdraw it from consideration.

Finally, Mitchell fails to challenge the substance of Judge Dickey's ruling, i.e., that the note was valid, due, and unpaid. Mitchell stipulated that Judge Dickey's findings would be binding. Judgment on the note in favor of Enderle was proper.

Code of Civil Procedure Section 583.310 Does Not Bar This Judgment

Mitchell contends this action is barred by Code of Civil Procedure section 583.310 that requires a case to be brought to trial within five years after it was filed. Despite the fact that the case is almost 25 years old, we are not persuaded.

Mitchell never brought a motion to dismiss the action under this section. Dismissal is mandatory only on motion of a party or the court. (Code Civ. Proc., §§ 583.310, 583.360.) In fact, Mitchell did not raise it as an issue until his supplemental opposition to Enderle's motion for judgment. This was after Mitchell had initially opposed the motion on the merits and prevailed on his motion to compel discovery to gather evidence that Mitchell was entitled to offsets or credits or that there had been payments on the note, thereby reducing any sums he might owe. The fact that Shimozono filed a motion to dismiss under this section in 1989 does not help Mitchell, but instead only highlights his own lack of action. By failing to raise the issue until the last minute, Mitchell waived any rights to have the case dismissed on this basis. (See

Butler v. Hathcoat (1983) 146 Cal.App.3d 834, 838-839 [waiver found where defendant did not raise five-year statute until after court had tentatively ruled against him].)

Judicial Estoppel Does Not Bar This Judgment

Mitchell asserts that Enderle has urged contradictory positions vis-à-vis the note. Specifically, she claims Enderle sometimes contends the note cause of action has never been tried, while at other times he maintains it was tried and decided and the only remaining action to be taken is entry of judgment. This, she argues, bars entry of judgment in Enderle's favor. We disagree.

"The doctrine of judicial estoppel '"precludes a party from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding,"' and '"prevent[s] the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." [Citation.]' [Citations.]" (*Michelson v. Camp* (1999) 72 Cal.App.4th 955, 970-971.) Here, even if there has been some vacillating on how Enderle has framed this issue, we do not view it as "intentional self-contradiction." Rather, it is more like variations on the same theme. Moreover, Enderle's statements have all occurred in the same proceeding. Finally, nothing in the record shows Mitchell has been prejudiced; even she does not claim it. Therefore, estoppel does not bar the judgment.

There is No Basis to Reduce the Amount of the Judgment

Briefly, conclusorily, and without citing any legal authority, Mitchell raises four grounds in support of her claim the amount of the judgment should be reduced. First, she relies on Shimozono's deposition testimony that his settlement with Enderle decreased the amount due by 50 percent. However, the Shimozono settlement agreement covered several claims and makes no reference to payment on the note. Further, Shimozono's belief that he and Mitchell were each liable for one-half of the note amount

does not change the legal reality that he and Mitchell were jointly and severally liable for payment.

Nor are we persuaded that Enderle acknowledged that the settlement with Shimozono reduced the note by 50 percent. In a personal multi-page letter Enderle sent to the trial court in 1990, he requested that the court order Mitchell to pay half the note amount. As Enderle's brief explains, this could mean any number of things, but it does not change the terms of the settlement agreement with Shimozono which did not discuss any payment on the note.

Mitchell also claims that since he was a partner in EMS, he would be entitled to his proportionate share of the judgment on the note. But Mitchell fails to address the specific findings made by the trial court that he had already received his share of the note in the payment to him for his partnership interest.

Mitchell argues that interest should be at the legal rate, not the note rate, from the date of Judge Dickey's 1985 tentative decision, or at the latest, his 1987 statement of decision, which found the note valid and unpaid. But there was no judgment entered at either of those times, and we find no reason or authority for reducing interest from either of those dates. Mitchell could have paid the amount due at any time and cut off interest completely. In addition, he could have had judgment entered at any time, thereby changing the interest to the lower legal rate.

Finally, Mitchell argues the amount of the judgment should be offset by allegedly unpaid costs awarded in 1992 against Enderle. Although she fails to point to anything in the record to show this was raised in the trial court, our independent review reveals that although it was argued in the supplemental opposition, there was no evidence proffered to support it. Thus, the claim is not properly before us.

The Motion for New Trial Was Properly Denied

The trial court has broad discretion to deny a motion for new trial, and we give great deference to the exercise of that discretion. (*Sherman v. Kinetic Concepts, Inc*. (1998) 67 Cal.App.4th 1152, 1160.) A new trial is not appropriate when the error, if any, was harmless. (*Id.* at pp. 1160-1161.) Mitchell sets out a laundry list of reasons why the court erred in declining to order a new trial, but fails to show their significance. Most of the grounds in the motion for new trial are the same arguments raised in opposition to the motion for judgment and before us on appeal, which we have already determined adversely to her.

None of the remaining issues persuades. Mitchell claims Enderle's motion for judgment was a procedural irregularity and against the law, and that it should have been a motion for summary judgment. She offers no explanation to support this contention and we see none. She also complains her discovery was limited to issues of offsets and payments on the note. But again, she neglects to explain how she was harmed.

Finally, we are confused by her conclusory assertion that the trial court record was "not available [to her] during the course of the hearings on the [first amended supplemental complaint] . . ." and see no reason to reverse the court's ruling on that basis. Likewise, we deny her request for judicial notice of a 1986 minute order she did not find during her "limited opportunity to review the [c]ourt file . . . ." The request was not made by noticed motion, as required. (Cal. Rules of Court, rules 22(a)(1), 41(a); *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744.) The court did not abuse its discretion in denying the motion for new trial.

Enderle Is Not Entitled to Attorney Fees

While conceding the note contains no attorney fee provision, Enderle maintains he is entitled to fees pursuant to the partnership agreement, which states: "If

any party hereto is required to institute legal action to enforce his rights under the Agreement or to have the meaning of any of its terms and provisions over which there is a dispute declared and determined by a court of law, the prevailing party or parties shall be entitled to reasonable attorneys' fees as awarded by the court in addition to all other recoverable costs and damages."

Enderle refers us to our prior opinion in which we determined that he was entitled to attorney fees under the partnership attorney fee provision. (*Mitchell v. Enderle, supra*, G016723, p. 27.) This, he asserts, is the law of the case for all the consolidated cases, including his claim under the note, despite the fact that a suit on the note itself would not have yielded attorney fees to the prevailing party.

To support this, he relies on what he maintains are two findings in Judge Dickey's statement of decision. The first, he contends, is that the facts in all of the consolidated cases, including the action on the note, "are inextricably linked to the dissolution of EMS," and the second is that Mitchell's failure to pay the note "was part of a series of breaches of the partnership agreement and an elaborate conspiracy to commit those breaches." Enderle has read far too much into Judge Dickey's statement of decision.

Nowhere does that document state that *all* facts in the consolidated cases are inextricably linked. What it does provide is that while some of the findings its sets forth deal with causes of action not tried at that time, "the court received extensive evidence concerning many of these matters in this phase because, as was made clear during the hearings, it was relevant evidence on the issue of the purpose and motivation for the [vote by Mitchell and Shimozono to expel Enderle from EMS] . . . ."

Furthermore, while Judge Dickey did determine that the note was "valid, due, owing and unpaid," he did not find that failure of Shimozono or Mitchell to pay it was a breach of the partnership agreement. What the decision states is that Mitchell and Shimozono, owners of an unrelated corporation, "plac[ed] their personal interests in [it]

above those of EMS." That corporation became a tenant in the shopping center being developed by EMS with "quite favorable" lease terms. When rent payments became delinquent, Mitchell and Shimozono personally signed the note in favor of EMS. After rent became delinquent again, the two then "devised and executed a scheme to remove from [their corporation] all of its valuable assets and transfer them without consideration to [themselves] in order to hide these assets from the admitted liability of [the corporation] to EMS." The decision went on to detail additional wrongful actions of Mitchell and Shimozono vis-à-vis their corporation, "all in an attempt to frustrate further investigation into breaches of fiduciary duty of Mitchell and Shimozono . . . ." (Capitalization omitted.) None of this misconduct included failure to pay the note. Thus, there is nothing in Judge Dickey's statement of decision that ties nonpayment of the note to breach of the partnership agreement or an action to enforce Enderle's rights under that agreement. Absent such a connection to the terms of the partnership agreement, we are not persuaded the attorney fee provision in that agreement controls the claim for payment of the note.

Nor is there any connection to the decision in our prior opinion awarding fees to Enderle based on the partnership agreement. The action on the note was not part of the judgment considered in the prior appeal. Without a provision in the note, Enderle is responsible for payment of his own attorney fees. (Code Civ. Proc., § 1021.)

DISPOSITION

The judgment and postjudgment order denying attorney fees are affirmed. The parties shall bear their respective costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.